IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO 2770 OF 2003
IN
SUIT NO.2980 OF 2003

Nikhil M. Adiecha ...plaintiff
V/s
Nikhil M. Adiecha and Others ..Defendants.

Mr. P.K. Samdhani with Birendra Saraf i/b Prakash and Company for the plaintiff.

Smt. N.Z. Khapra for defendant Nos. 2 and 3.

Mr. Rajesh Shah for defendant Nos.1,4 and 5.

CORAM : ANOOP V.MOHTA J.
DATE : 15TH SEPTEMBER, 2005.

P.C.

. A notice of motion has been taken out by the plaintiff in a suit for dissolution of accounts of partnership firm viz. C. Manjibhai & Company . The applicant-plaintiff and defendant No.1 are partners of the firm. Their father Manjibhai was also a partner of the firm till his death on 21/6/1992. Defendant Nos.2 and 3 are their sisters. Defendant No.4 is the wife of defendant No.1. Defendant No.5 is the son of defendant Nos. 1 to 4. An order dated 5th November, 2003 came to be passed by the learned Judge in the notice of motion taken out by the applicant, after hearing the parties and also after taking into consideration all the

affidavits and the counter affidavits the rejoinder filed by the parties and granted the ad-interim relief in terms of prayer clauses (a) and (b). However, the order in terms of prayer clause (a) was stayed for a period of 8 weeks.

2. Defendant No.1, against the said ad interim order had preferred appeal No. 1072/2003. A Division Bench of this Court on 17th December, 2003 passed the following order.

> "(i) The appeal is dismissed.
>
> (ii) The learned motion Judge is requested to hear and decide notice of motion No. 2770/2003 as early as possible.
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> (iii) The Court Receiver shall put up its board on the subject premises after 28/01/2004.
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> (iv) The Court Receiver shall invite bids from the first appellant and the first respondent for being appointed as agent and the party that gives higher bid shall be appointed as the agent of the Court Receiver on usual terms and conditions."

Therefore, the ad interim order dated 5th November, 2003 has been in operation since then, subject to above modification.

3. As observed above, in view of the Division Bench

order, dated 17th December, 2003, the Court Receiver has been appointed, and not disputed by the Counsel appearing for the parties and defendant No.1 as an agent of the receiver on usual terms and conditions.

4. Admittedly, there are no further affidavits, filed by the defendants except those referred above. All the averments in the plaint, as well as, the affidavits filed by the respective parties, as on the date of passing of the order of dismissal of the appeal by the division bench, also remained the same. The division bench has confirmed the ad interim order dated 5th November, 2003.

5. With the assistance of the Counsel appearing for the parties, we have gone through the basic pleadings and affidavits including, a Will dated 26/6/1993 and as alleged, an oral arrangement (xerox copy), dt. January, 1992.

6. The learned Counsel appearing for the appellant/plaintiff therefore prayed for a confirmation this of the ad-interiom order dated 5th November, 2003. The learned Counsel appearing for defendant NO.1,

however, resisted the same. Basically, by contending that in view of the oral arrangements in January, 1992 as referred above, and as also referred in the Will, there was family arrangement between the parties in the year 1992, itself. Therefore, now there is no question of existence of any partnership firm, as claimed and or averred by the plaintiff. The deceased Manjibhai in his will dated 21/6/1993, made reference, to the said oral arrangements and therefore, there is no question of any right whatsoever as claimed by the plaintiff in respect of the partnership firm, as well as, the property as referred in the plaint and or notice of motion.

7. The learned Counsel appearing for the plaintiff/appellant resisted the said contention and pointed out that the same points had been agitated by the learned Counsel appearing for defendant No.1 at the time of opposing the basic ad-interim order in question. The learned Judge while passing the ad- interim order dated 5th November, 2003 had considered the said contention about the arrangement of 1992. Apart from the dispute about the existence and/or execution of the said writing, there is undisputed position on the record that the document alleged to be the family arrangement,

is not an original document. The xerox copy of the said arrangement of January, 1992, has been relied upon. The counter contention raised, by the defendants' Counsel that the original copy of the said arrangement signed by 3 partners, was handed over to the plaintiff, as required by the deceased Manjibhai to prepare the final document. The learned Counsel appearing for the applicant/plaintiff denied, even the existence and or execution of the said writing itself, as observed in the order dated 5th November, 2003, by the learned Judge also.

8. In this background, it is very clear that the contentions, as raised revolving around the family arrangement of January, 1992, in question, is based upon the secondary documents and that is the xerox copy. There is nothing to justify, at this stage, to demonstrate even the execution and or an existence of the said document. There is nothing also on the record to show that the originals of this family arrangement was at any point of time was handed over and or is with the plaintiff. At this interim stage therefore, it is difficult to accept the contentions of defendant No.1 revolving around the said writing/arrangement and to

reject the case and or averments made by the plaintiffs, in the suit for dissolution of partnership in question. Such secondary document cannot be taken note of at this stage, without compliances of formalities and averments to the effect, of non availability of the original documents, as contemplated in reference to documentary evidence, under section 61 to 65 of the Evidence Act. The defendants' contention based on this xerox copy of the family arrangement of which execution itself is in dispute, therefore, difficult to accept.

9. The learned Judge has made reference to the Will and basically relied on the clauses, 12, 13, which have been referred by both the parties while submitting their respective contentions. There is a reference made of the said family arrangement and also of the intimation of oral arrangement to Shri Dhirubhai Shah. But at this stage. It is not clear and as contended by the Counsel appearing for the plaintiff, about its execution apart from the disputed signatures of 3 partners on the same. Unless the parties bring on the record, either original or secondary documents after completion of all the formalities and further prove the signatures of the partners, as alleged, in the it is difficult to

consider, the contention as raised by the defendants opposing the notice of motion.

10. The learned Judge, while granting ad interim has also considered this aspect in following words.

> "Mr. Tulzapurkar impugned the alleged agreement, indicating various factors which militate against the alleged execution of the writing and the fact of the arrangement having been entered into at all. He submitted that from January, 1992, till date Defendant No.1 had made no reference to the agreement or the writing. The records of the society show the suit firm to be the owner of the said property to date. The outgoings have been paid by the firm. In suit No.3723 of 1996 filed by Defendant Nos. 2 and 3 for the administration of the estate of the deceased, there is no mention of the agreement either. By an order dated 10th October, 2002, passed by me in Notices of motion Nos. 3252 of 1996 and 532 of 2001 in the said suit, the plaintiff and Defendant no.1 were directed to file an affidavit stating what according to them are the assets of the firm. Defendant NO.1 in his affidavit dated 31.10.2002 filed pursuant to the said order, stated that all the assets including the said hall were the assets of the firm. In an petition for probate of the said Will, Dhirubhai had shown the said premises as belonging to the partnership firm. Even the other assets of the firm which according to defendant NO.1, had been allotted to the respective parties under the agreement of 1992 have been shown by defendant No.1 and Dhirubhai as belonging to the firm."
>
> " It is a moot point whether that family arrangement was fully implemented or not. Though, in the affidavit filed today by Defendant No.1 there are indications that it was

> acted upon by the parties, the extent of the same, the effect of it after eleven years and the detailed terms on which it would finally rest are questions which must await the hearing of the Notice of Motion. It is not as if there is nothing that militates against the existence, and enforcibility of the arrangement."

In the appeal by the order dated 17th December, 2003, again this ,point was agitated and same was also rejected. Therefore, this contention of the defendant in view of the above observations in reference to the oral arrangement of 1992 needs to be rejected again.

11. The supporting position in respect of appointment of receiver and/or for grant of ad interim injunction in a such circumstances is observed by the Apex Court in **(Ashok Traders (firm) and another Vs. Gurumukh Das Saluja and others), 2004 (3) Mh.L.J. 592,** as under ;

> "A better course would have been to allow the conduct of the business continuing in the hands of persons who were doing so till now but at the same time issuing such directions and/or devising such arrangement as would protect and take care of the interest of those who are not actually running the business and that is what we propose to do."

12. The power of the Court to confirm the ad interim order cannot be equated with the power of appellate

Court, nothing has been pointed out, proved and or placed something glaring to interfere with the ad interim order, which was passed after hearing both the sides. The balance of convenience and equity also lies in favour of the plaintiff. The ad-interim order, confirmed by the division bench, has been in operation since long. There are no change of circumstances or additional material brought on the record.

13. The learned Counsel further submitted that defendant No.1 through out has contested the proceeding in a suit filed by sisters. The plaintiff never agitated such issue or such contention, at earlier point of time. This contention also cannot be accepted at this stage in view of the above observations.

14. In view of this factual and legal background, there is no case made out by the defendants to vacate and or invoke the ad interim order granted, in terms of prayer clause (a) and (b). On the contrary, there is a sufficient justification and this is a fit case, where ad interim as granted need to be confirmed.

15. Taking into account, I am inclined to confirm

the ad-interim order dated 5th November, 2003, in terms of prayer clause (a) and (b). The notice of motion is accordingly disposed of.

[ANOOP V. MOHTA, J.]